

1 legal and factual issues in this case.

2 **II. BACKGROUND**

3 Safeco, acting as surety, issued to CM seven payment and
4 performance bonds ("Bonds") on various construction projects on
5 which CM was the general contractor. Defendants' Memorandum in
6 Opposition to Plaintiff's Motion for Summary Judgment at 2
7 ("Defs.' Mem."). As part of this, CM "executed in Safeco's favor
8 a general agreement of indemnity" ("Indemnity Agreement"), which
9 provides for the defense and indemnification of Safeco for

10 [all loss, costs, and expenses of whatsoever kind and
11 nature, including courts costs, reasonable attorney fees
12 (whether [Safeco] at its sole option elects to employ its own
13 attorney, or permits or requires [Defendants] to make
14 arrangements for [Safeco's] legal representation), consultant
fees, investigative costs and any other losses, costs or
expenses incurred by [Safeco] by reason of having executed
any Bond, or of any Default under this agreement by any of
the [Defendants].

15 Declaration of Robert Ho in Opposition to Motion for Summary
16 Judgment ("Ho Decl."), Ex. A at 1. The Indemnity Agreement also
17 states that CM will pay Safeco

18 [upon demand...[an amount sufficient to discharge any claim
19 made against [Safeco] on any Bond [sic]. This sum may be
20 used by [Safeco] to pay such claim or be held by [Safeco] as
collateral security against any loss on any bond [sic].

21 Id.

22 Safeco was named as a defendant in four lawsuits ("Suits").

23 They are:

24 A. Romak Iron Works, Inc. v. Owa Steel, Inc., et al.

25 Romak Iron Works, Inc. named Safeco as a defendant in a 2002
26 suit in the San Francisco Superior Court. Defs.' Mem. at 3. At
27 trial, Bruce S. Echigoshima, an employee of Safeco, testified that
28 he informed Defendants about the pending litigation, but never

1 received a response. Default was entered against Safeco for
2 failure to file timely responsive pleadings. Safeco then retained
3 its own counsel, who was able to have the default vacated. Pl's.
4 Mem. at 5. Eventually, Defendants provided both a defense and a
5 promise to indemnify Safeco. Defs.' Mem. at 3. After a trial
6 decision in Romak's favor, CM "satisfied the judgment in Romak's
7 favor in full." Id.

8 Safeco insists that it should be compensated, per the
9 contract, for the money it paid in attorney, investigator, and
10 consultant fees to have the default removed, and for fees and
11 costs incurred for monitoring the underlying claims against the
12 Bonds, including active participation in settlement of the Romak
13 Iron action. Reply at 7.

14 B. Ki-Man Song, et al. v. Jin Construction & Electric Co.,
15 et al.

16 In September 2003, employees of Jin Construction filed a
17 lawsuit in the Northern District of California against Jin
18 Construction, CM, and Safeco. Defs'. Mem. at 4.

19 Defendants assert that the "[d]efense in this case has been
20 conducted by [a law firm] at CM's entire cost and expense and at
21 no cost to Safeco. No damages have been assessed against CM or
22 Safeco in this case." Defs'. Mem. at 5.

23 Again, Safeco insists that it should be compensated, per the
24 contract, for the money it paid in attorney, investigator, and
25 consultant fees.

26 At trial, Robert Chiang testified that he has settled the Ki-
27 Man Song case. The Court has heard since then that Robert Chiang
28 has paid the settlement amount in full.

1 C. The Last Two Suits: Wong Woong Im, et al. v. Jin
2 Construction Co., et al. and Chong Duk Kim, et al. v.
3 S.F.U.S.D., et al.

4 Defendants provided a defense to Safeco in the Wong Woong Im
5 action, which the Honorable Susan Illston of the Northern District
6 of California dismissed in September 2004. See Defs.' Mem. at 5.
7 "No damages were rendered against Safeco in this case, nor did
8 Safeco incur fees for its defense in this case because Defendants
9 provided a complete defense to Safeco pursuant to the indemnity
10 agreement." Id.

11 Again, Safeco insists that it should be compensated, per the
12 contract, for the money it paid in attorney, investigator, and
13 consultant fees.

14 At trial, Robert Chiang testified that the Chong Duk Kim
15 action, which has essentially the same plaintiffs as the Wong
16 Woong action, has settled. The Court has heard since then that
17 Robert Chiang has paid the settlement amount in full.

18 Safeco alleges that in response to all these Suits, it
19 "investigated and continues to investigate these claims, and as a
20 result has incurred and continues to incur loss, cost and
21 expense." Plaintiff's Memorandum in Support of Motion for Summary
22 Judgment at 2 ("Pl.'s Mem.").

23 At trial, Safeco asserted that Defendants owe Plaintiff
24 \$25,529.33.

25 **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

26 The Court finds that Defendants have breached the Indemnity
27 Agreement by (1) failing to pay for the costs associated with the
28 litigation of the Suits and (2) failing to give collateral

1 security when Plaintiff demanded it.

2 A. Attorney, Investigator, and Consultant Fees

3 In California, the elements for a cause of action for breach
4 of contract are: (1) the existence of a contract, (2) plaintiff's
5 performance or excuse for non-performance, (3) defendant's breach
6 and (4) damages resulting to plaintiff because of the breach.

7 See Armstrong Petroleum Corporation v. Tri-Valley Oil and Gas
8 Company, 116 Cal. App. 4th 1375, 1391, FN 6.²

9 The parties do not dispute that there is a contract (the
10 Indemnity Agreement) nor that Plaintiff performed under the
11 contract by issuing the Bonds to CM. The question for the Court
12 is whether Defendants breached the contract and whether this
13 breach resulted in damages to the Plaintiff.

14 The Indemnity Agreement, cited above, grants Plaintiff quite
15 broad coverage for "[a]ll loss, costs and expenses of whatsoever
16 kind and nature including reasonable attorney fee...consultant
17 fees, investigative costs" incurred by Plaintiffs "by reason of
18 having executed any Bond."

19 The parties don't dispute that Plaintiff incurred expenses
20 for attorneys, consultants, and investigators. The issue in

21
22 ² The Court determined that the Indemnity Agreement is
23 governed by the law of California, though the agreement is silent
24 on the issue of what state law governs it and Plaintiff is a
25 resident of Washington. In determining this, the Court looked to
26 California Civil Code § 1646 and to the Restatement, as required by
27 Shannon-Vail Five Inc. v. Bunch, 270 F.3d 1207, 1210 and to
28 Washington state law. The Court took into account the fact that
the Indemnity Agreement was executed in California, that the
underlying public works projects were in California, and the surety
bonds were issued in California. See Plaintiff's Supplemental
Briefing Regarding Applicable Law at 2-4. Furthermore, the parties
stipulated that they believed the contract to be governed by
California law.

1 dispute, as stated in the papers and at trial, was whether these
2 expenses and the amount of the demand were reasonably incurred and
3 whether the amounts themselves were reasonable.

4 The Court finds that the Defendant breached the contract and
5 this breach caused damage to the Plaintiff by requiring it to hire
6 attorneys, investigators, and consultants. The Court finds that
7 it was reasonable for Plaintiff to hire attorneys, investigators,
8 and consultants to participate in and monitor the on-going Suits.
9 Because of Defendants' failure to take up Plaintiff's side in the
10 Romak action, default was entered against Plaintiff. After such
11 an action, any reasonable party would be concerned that its
12 interests were being properly taken care of. From that point,
13 Plaintiff's decision to hire counsel and others to assist in and
14 monitor the litigation of the Suits was reasonable. Also, because
15 Safeco's potential exposure on the Suits was enormous, Plaintiff's
16 cautionary measures were entirely reasonable. Furthermore, the
17 Court finds that the amounts spent on those cases were reasonable.
18 Accordingly, the Court AWARDS Plaintiff \$25,529.33.

19 B. Collateral Security

20 Though Defendants have made statements at various times
21 indicating that the Ki-Man Song case and the Chong Duk Kim case
22 have both settled, the Court has yet to receive official
23 confirmation of the settlement of either case. The Court
24 therefore finds that Plaintiff is entitled under the Indemnity
25 Agreement to demand collateral security from Defendants in the
26 amount of \$500,000.00 to protect Plaintiff from any possible
27 liability flowing from these cases. Accordingly, the Court AWARDS
28

Plaintiff \$500,000.00 in collateral security.

IV. CONCLUSION

The Court finds that Defendants breached the Indemnity Agreement and therefore Plaintiff is owed damages in the amount of \$25,529.33 and collateral security in the amount of \$500,000.00. The Court finds that these Defendants are jointly and severally liable for paying these damages.

Accordingly, the Court finds in favor of Plaintiff Safeco Insurance Company of America and against Defendants Lori Chiang, Robert Chiang, and Chiang CM Construction Company, Inc.

IT IS SO ORDERED.

Dated: November 30, 2006



UNITED STATES DISTRICT JUDGE